IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGMENT NO.89 OF 2006

IN

SUMMARY SUIT NO.3147 OF 2005

Master Financial Services Limited. ...Plaintiff.

vs.

Mahesh Parekh. ...Defendant.

Mr.Virag Tulzapurkar with Ms.Meenakshi Iyer i/b. Doijode Associates, for Plaintiff.

MR.Sanjay Jain with J.P.Shah i/b. M/s.JPS Legal, for Defendant.

CORAM: D.K.DESHMUKH,J.

DATED: 17th July, 2006.

P.C.:-

The plaintiff has filed this suit on the basis of the agreements of personal guarantees signed by the defendant, entered into between the plaintiff and the defendant, copy of one agreement is at Exhibit "A" and the other is at Exhibit "B". Both are identical. The defendant was the Managing Director of the Company known as

"Vidhi Industries Limited". That company approached the plaintiff in the year 1995 requesting it to finance the purchases of goods made by the Company from its suppliers. The plaintiff agreed to pay the purchase price of the said goods on the condition that they were to be furnished with the bills of exchange drawn by the supplier in the amount of the purchase price, accepted by the Company and payable to the order of the plaintiff. Pursuant to these agreements, the plaintiff discounted the bills of exchange, in consideration of this the defendant furnished to the plaintiff irrevocable personal guarantees executed in favour of the plaintiff. Under each of the two personal guarantees, the defendant agreed to pay to the plaintiff Rs.20,00,000/- (Rupees Twenty lakhs only). The defendant thus, by these two personal guarantees guaranteed repayment to the plaintiff of an aggregate principal amount of Rs.40,00,000/-. The defendant, under the personal guarantees, has agreed that in the event of any default by the Company in making repayment of the amounts due in respect of the discounting facility, the Defendant would, forthwith on the Plaintiff notifying such default to the Defendant, make payment to the plaintiff of the maximum principal amount and the amount of the interest, commission, costs, charges and expenses charged upon the Company by the Plaintiff in respect of the discounted hundies. After these agreements were entered into, the company had purchased the goods from several suppliers. The bills of exchange were discounted by the

plaintiff. Some repayments were also made by the Company. As the amounts were not fully paid, the plaintiff had called upon the company to pay the amounts. On demand, the company accepted its liability and sent twelve post dated cheques to the plaintiff. Thereafter again the Company had sent two more post dated cheques for discharge of liabilities. But ultimately the company did not make payment and the plaintiff was constrained to file summary suit no.5708 of 1999 in this Court. It appears that the company is under liquidation. The provisional liquidator has been appointed. Therefore, the summary suit that has been filed against the company has not proceeded further. It further appears that the plaintiff has also filed complaint under Section 138 of the Negotiable Instrument Act against the Company and its Directors including the defendant in relation to dis-honour of cheques. As the default was committed by the Company in paying the amount, the plaintiff by letters dated 11.8.2005 and 24.8.2005 invoked the personal guarantees given by the defendant and called upon him to make payment in terms of those guarantees. The defendant did not make payment and denied his liability to make payment, hence, the present suit has been filed.

2. The defendant has put up principally two defences. The first defence is that in the balancesheet of the company for the year 2002-03 and 2003-04 under the head “Current assets, loans and

advances" only an amount of Rs.21,95,756.13 is shown and therefore, according to the defendant, the amount of more than Rs.40,00,000/- towards the claim of the plaintiff, on the plaintiff's own showing is not payable by the defendant to the plaintiff. The second defence is that by letter dated 31.10.1998 the defendant had revoked the guarantees and therefore, the plaintiff should have filed this suit within three years from 31.10.1998 and thus, the suit is barred by the Law of Limitation. It is further submitted that though in the plaint the plaintiff is relying only on the demand notice issued in the year 2005, in the complaint that was filed by the plaintiff under Section 138 of the Negotiable Instrument Act, the plaintiff has stated that repeated demands were made with the defendant, and therefore, according to the defendant, the plaintiff is not justified on relying on the demand notice of the year 2005, so far as the period of limitation is concerned. The learned Counsel appearing for defendant in support of his submission relies on the judgment of the Supreme Court in the case "Syndicate Bank Vs. Channaveerappa Beleri and others, MANU/SC/2032/2006."

3. In so far as the first defence regarding the reliance on the balancesheet of the plaintiff is concerned, the reference has been made for the first time in the sur-rejoinder filed on behalf of the defendant and in that sur-rejoinder also the defendant merely states that the figures mentioned in the balancesheet, of the amount due to

the plaintiff from the defendant is wrong, and for that purpose reliance is placed on the extract of the balancesheet of the plaintiff referred to above. The learned Counsel appearing for plaintiff has pointed out the relevant portion of the balancesheet which shows that a huge amount is shown to be due to the plaintiff-company under Schedule III which has heading "Current assets, loans and advances". In my opinion, only from the extract of the balancesheet which is produced by the defendant an inference can not be drawn that according to the plaintiff the amount more than Rs.40,00,000/- which is claimed in the suit from the defendant is not due to the plaintiff from the defendant.

4. So far as the second defence is concerned, in my opinion, clause 2, 3 and 4 of the Guarantee are relevant, they read as under:-

> "2) I agree that the amount hereby guaranteed shall be due and payable to you on your serving me with a notice, requiring payment of the amount, and such notice shall be deemed to have been served on me either by actual delivery thereof to me or by despatch thereof to me by registered post at my address written hereunder or any other address in India to which I may be written intimation given intimation given to you request notice address to me to be despatched.
>
> Any notice despatched by you by registered post to me at the address to which it is

> required to be despatched by this clause shall be deemed to have been duly served on me at the time when the notice would in ordinary course of post be delivered at the address, notwithstanding that the notice may not in fact have been delivered to have ceased to my address.
>
> 3) The Guarantee shall be a continuing guarantee and shall not be revoked.
>
> 4) This Guarantee may be revoked by delivery to you at Bombay of a written notice signed by me intimating our desire in revoking the quarantee, but such revocation shall not effect my liability for all advances made and credits given by you before delivery of the aforesaid notice."

It is clear from the above referred clauses that the liability of the defendant, to make payment of the amount guaranteed, arises only when the plaintiff serves on him a notice addressed to him personally and serves at his residential address and as the guarantee given by him is a continuing guarantee, it cannot be revoked. The only method by which it can be revoked by the defendant is by delivering the notice signed by him intimating his desire to revoke the guarantee and even then the revocation applies to only future advances and claims and not to the past advances and claims. For the purpose of claiming that the defendant has revoked the guarantee, the defendant relies on the letter dated 31.10.1998. That letter is a reply given by the Advocate of the

Company to the letter of the plaintiff dated 24.10.1998. Perusal of the letter of the plaintiff shows that the plaintiff had addressed a letter to the Company and its Directors. The letter was also sent to the defendant as he was Managing Director of the Company and the reply to the said letter was given by the defendant on behalf of the company and its Directors. The reply was not given by the defendant in his personal capacity and in that reply the stand of the company was that the company has paid up the amount of Rs.10,00,000/- (Rupees Ten lakhs only) pursuant to the agreement dated 11.10.1995 and therefore, nothing is payable by the company and therefore, nothing is payable by the guarantor. This will not amount to written notice given by the defendant in his own hand to the plaintiff intimating his desire of revoking the guarantee, and therefore, in my opinion, on the basis of the letter dated 31.10.1998 the defendant cannot claim that he has revoked the guarantee by letter dated 31.10.1998. Perusal of the complaint under Section 138 of the Negotiable Instrument Act shows that the complaint arose out of dis-honour of the cheque given by the company. The defendant was joined as accused in his capacity as the Managing Director of the Company who has signed the cheque and therefore, the plaintiff's by the statement in the complaint that “the amount was repeatedly demanded” what the plaintiff means is that the amount was repeatedly demanded from the company. Really speaking as the method of making demand under the agreement of personal

guarantee is specifically laid down by clause (2) of the contract, no other method of demand would be permissible. In my opinion, the learned Counsel appearing for plaintiff has rightly relied on the judgment of the Division Bench in the case “Ram Nagappa Shetty Vs. Syndicate Bank and others, 1987 (2) Bombay C.R. 362”. So far as the reliance placed by the learned Counsel appearing for defendant on the judgment of the Supreme Court in the case “Syndicate Bank vs. Channaveerappa Beleri and others” in my opinion, this judgment is in no way helping the defendant. Perusal of paragraph 11 to 15 of the judgment of the Supreme Court in the “Syndicate Bank vs. Channaveerappa Beleri and others.” shows that the Supreme Court has also held that in case of continuing guarantee when the amount is payable, the cause of action would arise only when the demand is made. I have already observed that in the present case the letter which is relied on by the defendant of the year 1998 cannot be termed as a notice, either refusing to make payment by the defendant or revocation of the guarantee. It appears that neither the company nor the defendant are in a position to pay the dues and therefore, such defences are raised which have no substance. In the result therefore, the summons for judgment is granted. Suit of the plaintiff is decreed in terms of prayer clause of the suit. Refund of court fees as per rules.